

Disability accommodation: a compliance reminder

October is National Disability Employment Awareness Month - a designation created by Congress in 1988 to raise awareness of the employment needs and contributions of individuals with all types of disabilities. In light of this, it is the perfect time for a reminder on how to properly deal with one of the most common classes of disability that we see employers running afoul of: mental or psychological.

Title I of the Americans with Disabilities Act (ADA) prohibits employers with 15 or more employees from discriminating against qualified individuals with disabilities in any terms, conditions or privileges of employment (Oregon law extends this prohibition to employers with six or more employees). An individual is legally disabled under this rule if he or she has a physical or mental impairment that substantially limits one or more major life activities. The law requires an employer to provide reasonable accommodation to an employee or job applicant with a disability to allow the employee to perform his or her job, unless doing so would cause significant difficulty or expense for the employer.

While some disabilities are usually more apparent to employers, such as deafness or blindness, less obvious conditions could qualify as a disability as well, such as depression, seasonal affective disorder, or substantial stress or anxiety. Studies show one in five Americans experiences a mental illness every year, and nearly 18 percent of workers in the U.S. report experiencing some form of mental illness each year. Depression and anxiety seem to be on the rise in workplaces, and more and more employees are seeking accommodations for these conditions. Thus, employers should be extra aware of the potential for mental or psychological disabilities in their employees to ensure compliance with relevant disability laws.

An employer, once aware of an employee's disability or when an employee requests an accommodation, must engage the employee in an interactive process to determine what reasonable accommodations can be made. The process should form a discussion that explores the employee's work challenges and how those issues can be resolved



COMPLIANCE CORNER

Sean Ray and Wilson Jarrell

without placing an undue hardship on the employer. Notably, employers are not required to accept an employee's reasonable accommodation request, even if that request comes from a treatment provider, such as a doctor or a psychologist. Rather, the employer has the right to suggest an alternative accommodation, as long as that alternative is equally effective to accomplish the desired result. Document this entire process, including proposed accommodations and any failure by the employee to accept accommodations or participate in good faith.

Reasonable accommodations can take many forms relevant to a psychological disability: modified work schedules, leave without consequence, or job restructuring and the elimination of marginal functions. Workplace policies could be changed, or the use of a service animal could be allowed. A more structured supervisory style could be implemented, or an employee could be allowed to work from home part- or full-time. As long as it would effectively allow the employee to do his or her job, an employer could craft or choose any accommodation. The United States Department of Labor's Office of Disability Employment Policy offers several great tools for helping employers create appropriate accommodations for mental health impairments on its website.

Granting a reasonable accommodation in the form of leave is usually a less-than-desirable option, but is sometimes necessary. Leave requests for a purpose related to a disability often fall under existing employer policies, and thus must be treated the same as a request for leave for a non-disability purpose. Additionally, an employee who has a disability may also have a "serious health condition" under the Family and Medical Leave Act (FMLA) and the Oregon Family Leave Act (OFLA). In that case, the employee may be entitled to up to 12 weeks of unpaid

leave. However, the obligation of an employer does not necessarily stop there. An employer should consider providing further unpaid leave as a reasonable accommodation under the ADA (or Oregon equivalent) if the employee needs it.

An employer is not required to make a reasonable accommodation that will pose an undue hardship to its business. Keep in mind, however, that establishing an undue hardship is a high bar. In determining what may constitute an undue hardship, courts will consider the cost of the proposed accommodation to the employer, the size of the employer and the number of employees, the different shifts available, and the requirements of the employee's job. When considering whether leave would impose an undue hardship, an employer must look to see if there is a vacant, equivalent position for which the employee is qualified and could be reassigned (while working a reduced schedule) without undue hardship to the employer. If not, the employer must look for a lower level position that would fit the bill. If nothing is available, then continued accommodation is not required.

Employers should always consider whether an employee complaining about a mental state is merely venting or is in fact disclosing a disability. If it's the latter, that disability should be treated just as seriously as any other disability. Because this is a tricky area where missteps are common, employers should consider speaking with counsel prior to taking disciplinary actions against an employee who has a disability, psychological or otherwise.

Sean Ray is an attorney with Barran Liebman LLP. He advises and represents employers. Contact him at 503-276-2135 or sray@barran.com.

Wilson Jarrell is an attorney with Barran Liebman LLP. He advises and represents employers. Contact him at 503-276-2181 or wjarrell@barran.com.

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